Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	
	)	

Comments

BellSouth Corporation ("BellSouth") hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking released April 9, 1996 (FCC 96-154) ("Notice").

I. Competition Cannot Be "Effective" Unless LECs Have Access To The Same Programming As The Incumbent Cable Operator.

The Telecommunications Act of 1996[1] ("1996 Act") increases public reliance on competition to protect against unreasonable cable service rates by expanding the definition of "effective competition" to include certain situations in which "a local exchange carrier ["LEC"] or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming directly to subscribers . . . "[2] Such an offering is considered to be "effective competition" to an unaffiliated incumbent cable operator in a franchise area "only if the video programming services so offered in that area are comparable to the video programming services

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 101 Stat. 56, enacted Feb. 8, 1996 ("1996 Act").

[2] 1996 Act, § 301(b)(3)(C), *to be codified at* 47 U.S.C. § 623(1)(1)(D).

provided by the unaffiliated cable operator in that area."[3] Neither the 1996 Act nor the Joint Explanatory Statement defines "comparable." The latter does, however, describe a minimum standard: "The conferees intend that 'comparable' requires that the video programming services should include access to at least 12 channels of programming, at least some of which are television broadcasting signals."[4] The Notice proposes to adopt this minimum standard as the definition of "comparable programming."[5]

In general, the adoption of this minimum standard is unobjectionable. If a LEC enters a particular market as a multichannel video programming distributor, it generally can make the business decisions necessary to enable its offering to compete effectively with the incumbent's (such as determining the number of channels of programming to offer). No rules are needed to define such behavior.

The only significant competitive factor beyond the LEC's control (other than regulation) is access to programming. Unless the LEC has fair access to the programming that customers want, it will not be able to compete effectively against the incumbent, and its presence in the market should not be regarded as "effective competition." Therefore, the Commission's implementation of Section 301(a)(3)(D) should consider access to programming in the determination of whether LEC entry constitutes effective competition.

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[3] Id.

[4] Telecommunications Act of 1996 Conference Report, H. Rep. 104-458 at 170 (January 31, 1996).

[5] Notice, ¶69.

The Commission's program access rules[6] do not provide a remedy for every situation in which a LEC's inability to obtain programming would effect its ability to compete effectively with the incumbent. To ensure that an incumbent cable operator cannot claim that a LEC's entry constitutes effective competition even though the LEC cannot obtain access to popular programming carried by the incumbent, the Commission should amend its rules to add the following at the end of new Section 76.905(4):

> provided, however, that such an offer of video programming services shall not constitute effective competition if (1) such carrier, its affiliate, or a multichannel video programming distributor using the facilities of such carrier or its affiliate has been denied access to any satellite broadcast or satellite cable programming that is carried by the rate-regulated cable operator in the franchise area or (2) if access to such programming has been offered only at prices, terms, or conditions that would be discriminatory under the provisions of Section 76.1002(b) of this part.

II. The Commission Should Use The Definition Of "Affiliate" In Title VI.

The Notice requests comments on the definition of "affiliate" in the context of open video systems and the cable-telco buy-out provisions of the 1996 Act.[7] Title VI already defines "affiliate" as follows: "the term 'affiliate,' when used in relation to any person, means another person who owns or controls, is owned by or controlled by, or is under common ownership or control with, such person . . . ."[8] Moreover, the Commission's rules implementing Title VI already contain a definition of "affiliate" that follows

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[6] 47 C.F.R. §§76.1000 *et seq.*

[7] Notice, ¶¶95-96.

[8] 47 U.S.C. §522(2). The 1996 Act adds a more restrictive definition of "affiliate" to Title I, but that definition applies "unless the context otherwise requires." 1996 Act §3(a)(2)(33), *to be codified at* 47 U.S.C. §153(1). In Title VI, the context clearly indicates no application of Title I's definition.

the statutory definition exactly.[9] The Notice offers no explanation of why the Commission is considering amending the existing definition.

There is no need to redefine a term that the Congress has defined unambiguously. If experience had shown the existing definition to be inadequate, the Congress could have amended the definition in Title VI as easily as it added the definition of "affiliate" in Title I. The Commission should assume that the Congress was satisfied with the definition that it had already given the term in Title VI and therefore used the term again with the expectation that the existing definition would be honored. The Notice cites no authority under which the Commission may choose to ignore the Congress' definition.

III. The Calculation Of "Gross Revenues" For Qualification As A "Small Cable Operator" Should Consider Only Revenues Derived From The Provision Of Cable Services.

The 1996 Act provides rate regulation relief for small cable operators under certain circumstances.[10] It defines "small cable operator" to exclude an operator that is "affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000." The Notice asks "whether only affiliates of the cable operator that are also cable operators should be included when aggregating gross annual revenues with respect to the $250 million threshold."[11]

Neither the 1996 Act nor the Joint Explanatory Statement provides a rationale for affording rate regulation relief to small cable operators or for the $250 million threshold.

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[9] 47 C.F.R. §76.5(z).

[10] 1996 Act §301(c).

[11] Notice, ¶86.

It should not be assumed, however, that these unexplained provisions have no public policy goal. The Commission's challenge is to interpret and apply them in a manner that is not arbitrary.

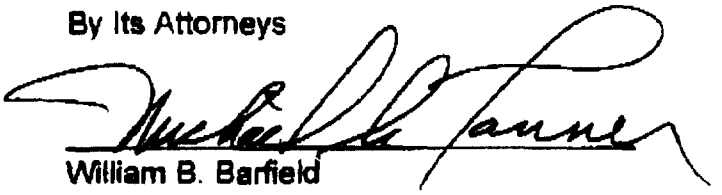
It is reasonable to assume that small cable operator relief is not based on a judgment by the Congress that small cable operators are less likely to charge unreasonable rates than are others. It is reasonable to assume also that the Congress did not judge those who exceed the $250 million limit to be more likely to charge unreasonable rates than those who do not. The only apparent reason for granting small operator relief is to reduce the administrative relief on small cable operators. The Congress apparently judged that regulation of rates for cable programming service imposes an administrative burden on small operators that outweighs its value to the public. Further, the only apparent reason for the $250 million threshold is that small cable operators that are affiliated with larger cable operations can share the administrative burden of rate regulation, as well as other overheads, with those affiliates. This opportunity for sharing the burden exists only with affiliated entities that also are cable operators. Therefore, the Commission should apply the $250 million threshold based only on revenues derived from cable services provided by affiliates of small cable operators.

To apply this provision to revenues derived from non-cable businesses would render it completely arbitrary and devoid of a public purpose.

Respectfully submitted,

BellSouth Corporation

By Its Attorneys



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